No. 142.
Supreme Court U. S.
FILED
OCT 21 1901
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Filed Oct. 21, 1901.

# IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF ARKANSAS, APPELLANT,

*vs.*

THE KANSAS AND TEXAS COAL COMPANY, *ET AL*, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION.

## BRIEF FOR APPELLEES

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ADIEL SHERWOOD,
of Counsel.

# IN THE

# SUPREME COURT OF THE UNITED STATES

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STATE OF ARKANSAS, APPELLANT,

*vs.*

KANSAS AND TEXAS COAL COMPANY AND THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, APPELLEES.

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## STATEMENT

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On the 23rd day of April, 1899, the following complaint was filed in the Sebastian Circuit Court for the Greenwood District, to-wit:

STATE OF ARKANSAS, Plaintiff,
*vs.*
Kansas and Texas Coal Company, and Saint Louis & San Francisco Railroad Company, Defendants.

Complaint in Equity.

1. The plaintiff, The State of Arkansas, on the relation of Jo Johnson, Prosecuting Attorney for the Twelfth Judicial Circuit, for her cause of action alleges:

2. That defendant, Saint Louis and San Francisco Railroad Company is a corporation organized under the laws of the State of Missouri, owning and operating a railroad in the Twelfth Judicial Circuit of Arkansas, and more particularly in Sebastian County, of said Circuit.

3. That defendant, Kansas and Texas Coal Company is a corporation, duly organized under the laws of the State of Missouri, owning and operating a coal mine at Huntington, in the Greenwood District of Sebastian County.

4. That a high state of excitement and condition of hot blood now prevails between the striking miners and their sympathizers in large numbers on the one side, and said Coal Company and its employees on the other.

5. That said Coal Company is threatening, and is about to import into said county and town of Huntington, over the line of their co-defendant's railroad, a large number of armed men of the low and lawless type of humanity, to-wit: About two hundred, to the great danger of the public peace, morals and good health of said county, and more particularly of said town.

6. That said threatened action on the part of said defendant, if permitted to be executed, would become a great public nuisance and would destroy the peace, morals and good health of said county and town—would lead to riot, blood shed and to the dissemination of contagious and infectious diseases.

7. That said county and town of Huntington are now enjoying peace, health and good order, and your relator believes that the loss of human life and untold expenses to the taxpayers of said county on account of probable violation of the criminal laws can and should be prevented by the power of the law.

8. Wherefore your relator prays:

1. That the defendant Kansas and Texas Coal Company, its agents, servants and employees, and each of them, be restrained and prohibited from importing or causing to be imported or brought into Sebastian County or the Twelfth Judicial Circuit of Arkansas, and that the Saint Louis and San Francisco Railroad Company, its agents, servants and employees—each, both and all of them—be enjoined, restrained and prohibited from importing, hauling, or bringing or causing to be imported, hauled or brought in the said county or circuit, and from unloading or attempting to unload from any of its cars in said county or circuit, any and all large bodies of armed, lawless or riotous persons, affected with contagious or infectious diseases that might endanger the peace, good order, or good health of the State, or create a public nuisance in said county or circuit, under the pains and penalty of the law;

2. That a temporary restraining order be issued; and that—

3. Upon final hearing said restraining order be made perpetual, and that the State have and recover her costs.

This complaint was verified by the oath of the relator. (Printed Record p. 2.)

The Circuit Judge granted the injunction, as prayed in the writ, against the defendants.

No affidavits were filed other than the verification of the prosecuting attorney to the complaint.

The affidavits in the record were taken in subsequent proceeding, as is shown by the dates of the same, all of the same being verified subsequent to the date of the filing of the complaint and the issuance of the order of injunction.

On the first day of the ensuing term of the Sebastian Circuit Court the defendants filed a petition and bond for removal to the United States Circuit Court for the Western District of Arkansas. Under the Arkansas practice the defendants had the first three days of the term in which to answer, and the petition and bond for removal were filed on the first day of the term within that time.

The substance of the petition for removal was as follows:

1. It set forth the diversity of citizenship between the relator, who was a citizen and resident of the Western District of Arkansas, Fort Smith Division thereof, and the defendants, each of whom were corporations organized under the laws of the State of Missouri.

2. That the suit was one arising under the Constitution and laws of the United States in this, that the Coal Company was engaged in the business of mining coal in the State of Arkansas, and transporting and selling the same therefrom in the States of Texas, Kansas and Missouri, and was engaged in interstate commerce: That the railroad company was a common carrier and engaged in carrying passengers and freight from and through the states of Arkansas, Missouri, Kansas, Texas, Indian and Oklahoma Territories, and engaged in interstate commerce. That the said defendants were instruments of interstate commerce, and that for the purpose of such commerce under the interstate commerce clause of the Constitution of the United States and the laws passed in pursuance thereof, they had the power and right, each to conduct its respective business, and to operate its mines, and transport and sell coal and transport passengers and freight, free and untrammeled from any and all restraints and conditions sought to be imposed upon them in this action. That this action is an attempt on the part of the plaintiff to interfere with and restrain the petitioners from carrying on their businesses aforesaid, and that it is in restraint of, and an abridgment upon, the rights and immunities enjoyed by them under the interstate commerce

laws of the United States, and in violation thereof, and that said action creates a substantial and serious burden upon interstate commerce.

3. That the suit is one arising under the Constitution and laws of the United States, and that the petitioners have a defense thereto arising under the laws of the United States. (Printed Record pp. 11-13.)

The petition for removal was duly verified and a sufficient bond given.

The State Court refused to grant the removal. (Printed Record pp. 14-16.)

The defendants took a transcript of the record and filed the same in the United States Circuit Court for the Western District of Arkansas, and gave the plaintiff notice thereof. (Printed Record pp. 17.)

The defendants filed answer in the United States Circuit Court. (Printed Record pp. 63-65.) And the petitioners filed replication thereto. (Printed Record p. 70.)

The first paragraph of the answer was a general demurrer to the complaint. This is permitted under the Arkansas practice.

It is not necessary to go into the other defenses presented in the answer, as the case was not tried, being determined upon the motion to remand and the demurrer and motion to dissolve the injunction.

The plaintiff filed a motion to remand. (Printed Record p. 67.)

The defendants filed a motion to dissolve the injunction. (Printed Record pp. 67-68.)

The Court held in substance that the cause was properly removed and it was not necessary to go into any question of the evidence, that no amount of proof sustaining the allegations of the complaint would entitle the plaintiff to the injunction prayed, and dissolved the same. (Printed Record p. 117.)

The evidence in the record consists of affidavits taken after the issuance of the injunction and testimony taken in the State Court on a preliminary motion which was treated as evidence on the hearing of the case in the United States Circuit Court, but as none of the evidence was considered, and only questions of law were passed upon, and that is all that is before this Court, no further attention will be paid to the evidence adduced.

While there are two questions raised, one as to the jurisdiction of the United States Circuit Court, and the other as to the dissolution of the injunction, they are, in fact, the same question, which is whether or not the complaint shows upon its face that a Federal question was raised,

and if it does show the same upon its face, it also shows that there was an attempt made on behalf of the plaintiff to assert rights contrary to the Constitution and laws of the United States. Therefore, the questions will be discussed as one.

## I

## THE OBJECT AND MEANING OF THE COMPLAINT.

We accord full sway to the oft repeated decisions of this Court, which hold that the presence of a Federal question must be tested by the complaint alone. To the complaint, however, must be added the facts of which the court takes judicial cognizance.

### (*a*) JUDICIAL KNOWLEDGE

Judicial knowledge will be taken of the boundaries of the State where the Court sits, and of the judicial district and of the municipal sub-divisions within it.

*Hoyt v. Russell, 117 U. S., 401.*

Likewise of the judicial districts into which the State is sub-divided.

*Ry. v. Hyatt, 48 Neb., 161, s. c. 67 N. W. Rep. 8.*
*People v. Robinson, 17 Cal., 363.*

Judicial cognizance is taken of the geography of the country, especially the local geography, the distance between towns, and the location of established cities and towns.

*Peyroux v. Howard, 7 Peters, 324.*
*Ins. Co. v. Robinson (8th Ct. Ct. of Appeals) 58 Fed. Rep., 723.*
*State v. Wabash Paper Co., 21 Ind. App. Rep. 167.*
*Woodard v. Ry., 21 Wis., 309.*
*Winnipiseogee Lake Co. v. Young, 40 N. H., 421.*
*Bruson v. Clark, 151 Ills., 495.*
*Ry. Co. v. Pierce, 95 Ind., 497.*
*Ry. v. Case, 15 Ind., 42.*

The location of established railroad lines and routes, being public highways, become "notorious and undisputable," so that Courts take judicial knowledge of them, as they do of the great natural highways, the rivers, bays and oceans.

*Ry. v. State, 72 Tex., 404. s. c. 13 Am. St. Rep. 815.*
*Miller v. Ry., 83 Tex., 518.*

It follows that the court where this suit was filed and the court to which the same was removed, knew the following facts:

The St. Louis & San Francisco Railroad is one of the great public highways of the Southwest, running out of St. Louis, Missouri. One part of that system is located through the State of Arkansas, said line leaving the parent stem at Monett, Missouri, and continuing southwesterly to Paris, Texas. It passes through Fort Smith, Arkansas, and thence south along and across the Arkansas state line to Jenson, thirteen miles from Fort Smith. At this station the line divides, one branch running through the Indian Territory to Paris, Texas, and the other running back into the State of Arkansas nineteen miles to its terminus at Mansfield, which is a town on the line between Scott and Sebastian Counties, Arkansas. No other line of road was at Mansfield at this time, and no line of railroad was in Scott County other than the terminus of this road at the border. Between Jenson and Mansfield is the town of Huntington, of about 1,500 population. The Twelfth Judicial Circuit of Arkansas, is composed of the counties of Scott and Sebastian. To take passengers to Huntington, from without the Twelfth Judicial Circuit, over the defendant's road, they must be carried into the Indian Territory to Jenson, thence to Huntington.

(*b*) MEANING OF IMPORT AND IMPORTING.

The gist of the complaint is found in the 5th paragraph and in the prayer.

After reciting that there is great excitement between the striking miners and their sympathizers on one side and the coal company and its employes on the other, the fifth paragraph alleges:

"That said Coal Company is threatening and is about to import into said county and town of Huntington, over the line of their co-defendant's railroad, a large number of armed men of the low and lawless type of humanity, to-wit: About two hundred, to the great danger of the public peace and morals, and good health of said county, and more particularly of said town."

The prayer is that the defendant Coal Company be restrained and prohibited from importing, or causing to be imported or brought into Sebastian County, or the 12th Judicial District of Arkansas, and that the railroad company be enjoined, restrained and prohibited from

importing, or bringing, or causing to be brought, or imported into said circuit, and from unloading or attempting to unload from any of its cars in said county or circuit any and all large bodies of armed, lawless or riotous persons, or persons affected with contagious or infectious diseases that might endanger the peace, good order or good health of the State, or create a public nuisance in said county or circuit.

When the word import is used as a noun it means property, and it cannot properly be applied to a free man. But, as used by the pleader in this case, and such use is not uncommon, it was obviously intended to use it in such sense. A discussion of the use of this word may be found in the case of the *People of New York vs. Compagnie Generale Trans-Atlantique, 107 U. S., 59.*

When the word "import" is used as a verb, it goes back to the derivative meaning, which is to "bring in". The Standard dictionary defines it as a verb as follows:

"To bring from a foreign country, or State, into one's own country or State; introduced from abroad, especially; commercially; opposed to export, as to import woolen goods; to import labor."

Webster defines it as follows:

"To bring in from abroad; to introduce from without, and especially to bring, as wares and merchandise, from another State or country in the transaction of commerce; opposed to export. We import teas and silks from China, wine from Spain and France and dry goods from Great Britain."

The lay definitions above are accepted as correct legal definitions, and "import" has been used in acts of Congress and in the courts as meaning to bring from abroad persons, especially laborers. Thus in the Alien Labor Contract Act, 23 Statutes at Large, 332, the title is: "An Act to Prohibit Importation and Migration of Foreigners and Aliens under Contract or Agreement, to Perform Labor in the United States, its Territories and the District of Columbia." In section 1 of said act it was made unlawful for persons or corporations "to prepay, transport or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories or the District of Columbia, etc." This act has been twice before the court in the cases of *Rector and Wardens of the Church of the Holy Trinity vs. U. S., 143 U. S., 457, and United States vs. Laws, 163 U. S., 258*, and in both of said cases the court treated the act as prohibiting the importation or bringing

into this country from foreign countries a certain class of laborers, under contract or agreement.

While upon the circuit Chief Justice Marshall had before him a case which called for the interpretation of the Act of February 28, 1803, entitled "An Act to Prevent the Importation of Certain Persons into Certain States Where, by the Laws Thereof, Their Admission is Prohibited," and he discusses the use of the verb "import" therein.

*Wilson vs. U. S. 1 Brock, 423, s. c. 30 Fed. Cases, No. 17846.*

We take it that these authorities sufficiently show that the verb "import" means to bring into the State from another State or foreign country. We take it that the location of the railroad company's line and the localities to be affected necessarily show that it was to prohibit the defendant Coal Company from bringing into the State of Arkansas, over the line of the defendant Railroad Company, persons from other States, Territories or countries, than the State of Arkansas. The geographical location of the line shows that necessarily they would have had to have been brought into the Indian Territory, thence into Arkansas again, even if they were started at any point in Arkansas. But the obvious intent and meaning of the importation of labor referred to was labor from other States or other countries. Such is the only meaning that can be placed upon the term "import," and that is strengthened, if strengthened it need be, by the fact that these laborers could not be brought into the town of Huntington over this line of railroad without first being brought through some other territory than the State of Arkansas in bringing them there.

This being the case, then the question is fairly presented by the complaint whether the State of Arkansas has the authority to prevent the coal company and the railroad company from bringing into the State over the line of this railroad laborers from other States or foreign countries.

The counsel for the State, in his argument in this court, claims that the State has the authority to do so, and to do so by injunction, and that the authority for such action is to be found in the police power of the State. We will therefore invite attention to that proposition.

## II.

### POLICE POWER OF THE STATE.

The line separating the police power of a State and the power of the general government in regulating interstate

commerce has been difficult to trace, and has received the attention of our greatest jurists from the beginning of our judicial history to the present time.

One of the earliest and greatest cases which touches upon this line is the decision of Chief Justice Marshall in *McCulloch vs. State of Maryland, 4 Wheaton, 316*, where the power of Congress to establish a bank and the power of the State to tax that bank, was considered.

In *Gibbons vs. Ogden, 9 Wheaton. 1*, it was held by the Court, through the Chief Justice, that wherever a State statute invades the domain of legislation which belongs to Congress that it is void, notwithstanding such statute may be in the exercise of the police power of the State.

In *Brown vs. State of Maryland, 12 Wheaton, 420*, another decision by Chief Justice Marshall, the right of the State of Maryland to levy a tax upon imports was considered, and it was held that no such power existed in the State, however indirectly it might be exercised, because it trenched upon the power of Congress to regulate commerce between foreign nations and the several States.

The "*License Cases*," *5 Howard, 504*, is one of the land marks in our jurisprudence. Chief Justice Taney delivered the opinion; and he had been counsel for the State of Maryland in the Brown case, and in the course of the opinion stated that the decision of Chief Justice Marshall in that case had convinced him that he was wrong in the views which he had urged upon the Court as counsel for the State of Maryland.

Chief Justice Taney recognizes the impossibility to mark, by a certain and distinct line, the division between foreign or interstate and domestic commerce, and to fix the precise point in relation to every imported article where the power of Congress terminates and that of the State begins, and that, as the Constitution itself does not attempt to define the same, it is necessarily a question for judicial decision.

This conclusion carried to its logical end would necessarily bring into this case a Federal question, as it would call for a decision by the courts of the legitimacy of the attempted exercise of the police powers of the State, and call for an adjudication whether such exercise was within the power of the State or whether it was an invasion of the interstate commerce clause of the Federal Constitution. Whenever a complaint sets forth such a state of facts, then a Federal question is presented by it, which entitled the parties thereto to have such question passed upon by the Federal tribunals.

In *Bowman vs. Railroad, 125 U. S., 465,* this Court through Mr. Justice Matthews said:

"However this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admitting of one uniform system or plan or regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. *Cooley vs. Port Wardens, 53 U. S., 12 How, 299; Crandall vs. Nevada, 6 Wall. 42.* Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature."

It was held in *Cooley vs. Port Wardens, 12 How., 299,* that the regulation of commerce with foreign nations and between the States, was equally given to Congress, and that laws infringing upon either were void.

In *Hannibal & St. Jo R. R. vs. Husen, 95 U. S., 465,* a statute of the State of Missouri prohibiting the importation of Texan, Mexican or Indian cattle was brought before this Court to consider whether it invaded the right of Congress to regulate commerce. The court said:

"The Missouri Statute is a plain interference with such transportation; an attempted exercise over it of the highest possible power—that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two-thirds of each year. * * * * The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between property of citizens of one State and that of citizens of other States. This Court has heretofore said that interstate transportation of passengers is beyond the reach of a State Legislature. And if, as we have held, State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers, is prohibited by the Constitution, because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation."

In the *Passenger Cases, 7 How, page, 283,* statutes of the State of New York and Massachussetts imposing taxation upon alien passengers arriving into ports of those States, were declared to be contrary to the Constitution and laws of the United States. All of the members of the Court gave separate opinions in that case and it is diffi-

cult to summarize the opinion of the Court itself. They differed in reasons but not in conclusions.

The same questions in another form are presented to the Court in the *Commissioners of Imigration vs. The Steamboat Lines, 92 U. S., 259.* The purpose of the legislation in that case was to protect the State against the flood of pauperism pouring in from Europe and landing in the State of New York. A complicated system of inspection of all imigrants to see that they were free of disease and infection was formulated by the Legislature of New York. It was attempted to be sustained as within the police power of the State, protecting its good order and its health against pauperism and infectious diseases..

It was argued in that case that as the statute did not come into operation until twenty-four hours after the passenger had landed and had mingled with, or had the right to mingle with, the mass of the population, that he was thereby withdrawn from the influence of any laws which Congress might pass on the subject, and remitted to the laws of the State. But the statute operated upon the ship owner and held him responsible for the passengers for twenty-four hours, just as in the case at bar this injunction seeks to operate upon the Railroad Company transporting the persons who are objected to. The Court said in regard to this that the effective operation of the law commenced at the other end of the voyage. Thus in the case at bar, the complaint shows that the men objected to were about to be imported, which necessarily means that they were about to be brought from another State or a foreign country, and it is at the other end of the voyage that they are interfered with by this injunction, as well as at this end of it, and thereby the interstate or international commerce is directly affected.

The State of California passed a statute which was aimed to exclude the Chinese from that State. It provided, in substance that the Commissioner of Immigration should satisfy himself whether any passengers who arrived in that State from any foreign port were lunatics, idiots, deaf, dumb, blind, crippled or infirm, or who were likely to become paupers, or had been a pauper in any country, or who from sickness or disease would likely become a pauper charge, or likely soon to become such, or a convicted criminal, or a lewd or debauched woman. The Commissioner was authorized to charge 75 cents for every examination of a passenger made by him, which sum he could collect from the master, owner or consignee of the vessel, by attachment. Bonds were to be given with sureties by the parties engaged in this traffic to obey the law, and various

and divers other similar provisions which were intended to enable the State through this statute, to exclude the Chinese; just as it is apparent from the allegations of the complaint in the case at bar, that it was intended to exclude the importation of miners to work in the mines of the defendant Coal Company in place of the striking miners.

A number of Chinese who were held by the Commissioner of Immigration under the operation of this law sued out writs of *habeas corpus* and the cases were decided by Mr. Justice Field while on Circuit, and are reported in the Federal cases as *In re Ah Fong, 1st Fed. cases, page 213.* Same case reported in *3 Sawyer, 144.* Judge Field reviewed the decision and approved the doctrine of the "Passenger Cases," wherein it was held that a State may entirely exclude convicts, lepers, persons afflicted with incurable disease, and may refuse admission of paupers, lunatics and others who, from physical causes, are likely to become a charge on the public, and that it may isolate temporarily the diseased until the danger of contagion is gone. These are held to be in the "Passenger Cases" and by Mr. Justice Field, as within the legitimate police power of a State, and are founded on the sacred law of self-defense.

Judge Fields holds, however, that whatever is outside of the legitimate exercise of this right affects the intercourse of foreigners with our people; their immigration to this country and their residence herein is exclusively within the jurisdiction of the general government, and is not subject to State control or interference; and further, that the power to regulate commerce with foreign nations and to prescribe the conditions of immigration or importation of persons is exclusively a national affair. But he holds further that there exists no right of exclusion in a State since the adoption of the Fourteenth Amendment, and whatever decision may have tended to concede to the States such powers were prior to that amendment and grew out of the condition of slavery. Justice Field takes up the very questions that this bill aimed at. It alleges that the Coal Companies are threatening to import a large number of armed men of the low and lawless type of humanity, and that their importation would be dangerous to the peace, morals and good health of the State and would lead to riot and blood-shed. Judge Field disposes of that matter in this way:

"Where the evil apprehended by the State from the ingress of foreigners, is that such foreigners will disregard the laws of the State and thus be injurious to its peace,

the remedy lies in the more vigorous enforcement of the laws, not in the exclusion of the parties."

And further,

"It is evident that if the possible violation of the laws of the State by an immigrant, or the supposed immorality of his past life or profession, where that immorality has not already resulted in the conviction for a felony, is to determine his right to land and to reside in the State, or to pass through into other and interior States, a door will be opened to all sorts of oppression. The doctrine now asserted by counsel for the commissioner of immigration, if maintained, would certainly be invoked, and at no distant day, when other parties, besides low and despised Chinese women, are the subjects of its application, and would then be seen to be a grievious departure from principal."

After discussing the evils to be apprehended from Chinese immigration, and admitting the grounds of the feeling against it, he says:

"A State cannot exclude them arbitrarily, nor accomplish the same end by attributing to them a possible violation of its municipal laws." And again:

"And the power of exclusion by the State * * * * extends only to convicts, lepers and persons incurably diseased, and to paupers and persons who, from physical causes, are likely to become a public charge."

This case, if followed, would be the end of the case at bar in any forum wherever it is brought, but the first question before you now is the determination of whether or not a Federal question was raised by the complaint. It is seen that a limited power is possessed by the State of exclusion by APPROPRIATE LEGISLATION (none by injunction), while this bill aims to cover that right and also to cover others not enumerated within that right, to-wit, armed men of the low and lawless type of humanity, and hence, a proper construction of the police power of the State and how far the same may extend and not conflict with interstate or international commerce, is the question for determination on the face of the complaint. This question does not rest merely upon a decision of Justice Field, while it alone would doubtless be sufficient, so forcible is his exposition of the principles involved.

The same question was before this Court in the case of *Chy Lung vs. The Commissioner of Immigration*, reported in *92 U. S., page 275.*

Chy Lung was the companion of Ah Fong. who was released by Justice Fields on *habeas corpus.* Chy Lung's

case went to the Supreme Court of California and was carried from it to this court, the opinion was delivered by Mr. Justice Miller. He first reviews the legislation which has been referred to, and says:

"The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress and not to the States. It has the power to regulate commerce with foreign nations; the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

"We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right if it exists. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a State statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question."

There is no difference in principle between the exclusion by a State of foreigners and the exclusion by one State of the citizens of another, except that there is an additional clause to the Constitution which would prevent the exclusion of citizens of other States; that is the clause providing that the citizens of one State shall have all the rights, privileges and immunities of another. Upon the general proposition that the same want of power to exclude a foreigner prevents the exclusion of a citizen of another State; see

*Bowman vs. Chicago & N.-W. R. R., 125 U. S., 465.*
*Hannibal & St. J. R. R. vs. Husen, 95 U. S., 465.*

In the case of *Hannibal & St. Joe R. R. Co. vs. Husen, supra*, the Court said after referring to the Chy Lung case and the New York Passenger cases:

"These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal Government."

The court in this same case, *R. R. vs. Husen*, in holding the statute of Missouri invalid, did so notwithstanding the Supreme Court of Illinois had held a similar statute to be valid. The Illinois Court had proceeded upon the ground that the proper inquiry for the regulation of the police powers was for the legislature and not for the Courts. The Court said, through Mr. Justice Strong:

"With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the Courts to guard vigilantly against any needless intrusion."

A late impression of this Court upon this question the case of *M. K. & T. R. R. Co., vs. Haber, 169 U. S., 613.* This was a consideration of the law of the State of Kansas passed for the prevention of contagious and infectious diseases in cattle and establishing cattle quarantine and sanitary regulations to carry out its object and purpose, which was to prevent the importation of diseased cattle. The court held that this was a proper exercise of the police power of the State. There were many questions passed upon in this case, and among others it was held that this was not a regulation of commerce because this statute only incidentally and indirectly affected such commerce. This case proceeded upon the doctrine that a State may exclude from its limits convicts, paupers, idiots and lunatics and cattle and goods which are dangerous to the property of citizens of the State as having communicable diseases in them. Such legislation is undoubtedly valid if confined to such matters, but the bill in the case at bar does not seek to confine itself to such matters as that, but also seeks to exclude the lowly type of humanity from the borders of the State. If we had a statute in Arkansas containing the words of this complaint and saying that such persons as are therein described shall be excluded, then the question would occur whether that was in the police power of the State, or was it an interference with the interstate commerce clause of the Constitution. We confidently submit that it would be contrary to that clause.

Upon this question of exclusion, the Arkansas Court has considered it incidentally in the case of *Buell vs. State, 45 Ark., 336*, the Attorney General contended for the right of exclusion of a prostitute from the State on account of her

degraded occupation, but the Court, through Mr. Justice Smith, said:

"Possibly the right to live in a given community is a common right of which a person cannot be deprived however degraded or subversive of good morals his occupation may be," and cites authority from the Supreme Court of Texas to the effect that such exclusion cannot be had.

*Milliken vs. City Council, 54 Tex., 388, s. c. 38 Am. Rep., 629.*

The right of importation of liquors, and right to license or prohibit the sale of intoxicating liquors, were questions fruitful of litigation and engendering much difference of opinion and State legislation. These questions were finally put at rest by the case of *Leisy vs. Hardin, 135 U. S., p. 100*, where the previous decisions are carefully reviewed by Chief Justice Fuller. The doctrine of that case was, in substance, as follows:

That a citizen of a foreign State has a right to import beer into another State and had the right to sell it where imported, but the sale of it must be in its original condition as an imported article. After that condition was changed the State had the right to interfere, by seizure or any other action it saw proper, in prohibition of sale by the foreign non-resident importer, and however deleterious and dangerous to the morals of the State the sale of intoxicating liquors might be, they are the subject of interstate commerce and cannot be controlled by State laws, amounting to regulations, while they retain their interstate character as importations, and said:

"To concede to a State the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create. Undoubtedly there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson in *Gibbons vs. Ogden, 9 Wheat., 1*, 'in a frank and candid co-operation for the general good.'"

Certainly if importation of intoxicating liquors, which were declared by the laws of Iowa to be injurious to the peace, health and morals of that State, could not be prevented by Legislation of that State, when sought to be done by a citizen of another, then, *a fortiori*, the importation of laborers from other States or countries by a citizen of Missouri into the State of Arkansas, can not be prevented by the State of Arkansas however deleterious to its peace, morals and good order the State of Arkansas might regard such importation; for as seen in the citations given and to be given, the transportation of passengers is as much interstate commerce as the transportation of freights.

The decision in *Leisy vs. Hardin* was announced in April, 1890, and shortly thereafter, on August 8, 1890, Congress passed an act conceding to the States police regulations of original packages of liquor to be sold within the State. This act has been passed upon by this Court several times. The ultimate conclusions in regard to the same were announced in *Rhodes vs. State of Iowa, 170 U. S., 412.*

The right to sell original packages free from State interference was held in *Leisy vs. Hardin* to be an essential incident to interstate commerce, but only an incident, as the contract of sale was the act of interstate commerce, and this incident could be delegated to the States by congressional legislation, and said:

"On the other hand, the right to contract for the transportation of merchandise from one State into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State. The purpose of Congress to submit the incidental power to sell to the dominion of State authority should not without the clearest implication, be held to imply the purpose of subjecting to State laws a contract which in its very object and nature was not susceptible of such regulation, even if the constitutional right to do so existed, as to which no opinion is expressed."

This principle is illustrated by the case of *Bowman vs. Railroad, 125 U. S., 465*, and attention is called to the quotation in that case, which is again approved in the Rhodes case, from *Hall vs. DeCuir, 95 U. S., 485*, in referring to a statute under consideration, the Court said:

"While it purports only to control the carrier when engaged within the State, it must necessarily influence his

conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and some times those taken up within and put down without. * * If each State was at liberty to regulate the conduct of carriers, while within its jurisdiction, the confusion likely to follow could not be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay, more; it could prescribe rules by which the carrier must be governed within the State, in respect to passengers and property brought from without."

What could be more applicable to the case at bar? These passengers are brought from without the State, and the State seeks to regulate their introduction into the State, because it alleges that their introduction would create a public nuisance and cause bloodshed and disturbance. Necessarily it operates upon the carrier at the point of embarkation of such passengers, and necessarily it interferes with the Coal Company's purpose to import those passengers into the State.

The Act of August 8, 1890, was again before the Court in *Vance vs. Vandercook, 170 U. S., 438.* The Court said:

"But the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the State law. Either the conditions attached by the State law unlawfully restrain the right or they do not. If they do—and we shall hereafter examine this contention—then they are void. If they do not, then there is no lawful ground of complaint on the subject."

The same test may be brought to the case at bar. Either the right of the Coal Company to bring these laborers into the State exists under the Constitution and laws of the United States, or it does not exist; and the determination of whether or not it does exist necessarily brings to an adjudictation in this action a construction of the Constitution and laws of the United States.

Then the Court proceeds to take up and examine the inspection laws under consideration, and to determine whether or not the regulations hampered interstate commerce and said:

"On the face of these regulations, it is clear that they subject the Constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of the citizen of another State to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right."

There is no statute of Arkansas which provides for the inspection of passengers brought into the State, or regulations concerning them, but the injunction in this case makes the certificate of an officer of the State of Arkansas a prerequisite to the admission into the State of certain persons. This injunction may be found at pages 3-4 of the Printed Record. It is a notice to the defendants of the action of the court in enjoining them from importing certain people into the Twelfth Judicial Circuit, and orders the clerk to incorporate this order into the summons, and the sheriff of the county is "hereby empowered to do and perform all things lawful to be done, to the end that a strict enforcement of this order shall in all things be had and enforced." The sheriff, as the executive arm of the court, was ordered to prevent the importation into his county of any and all "bodies of armed, lawless or riotous person or persons affected with contagious or infectious diseases that will or might in any way endanger the peace and good order, morals or good health of the State or create a public nuisance in any locality in said county."

As heretofore shown these parties could only be brought to Huntington by bringing them in from the station at Jenson, in the Indian Territory on the State line. It therefore became the duty of the sheriff of Sebastian County to go to the Station of Jenson, and there to inspect all passengers proposed to be carried by the defendent Railroad to the town of Huntington. He was to pass upon their physical condition and ascertain if they had contagious or infectious diseases. This is a well known quarantine regulation, which can, *under appropriate legislation*, be exercised. But in this case there was no legislation for its exercise. But his duty did not stop with an examination of the physical well-

being of the passengers. He was also to investigate and find if they were armed. We presume that this would call for a search of their persons as well as to see whether they carried arms in their hands. He was further to investigate the passengers and find if they were lawless. If they were lawless, he should stop them at Jenson; if they were not lawless, they could go on to Huntington. He was further to find out whether these passengers were riotous; if they were riotous they were to stay at Jenson; if they were not riotous they were to go on to Huntington. But that was not all, he was further to determine whether these parties "will, or might in any way, endanger the peace, good order, morals or good health" of the State, or "create a public nuisance in any locality in said county." If they would endanger the peace, good order, morals or good health of the State they were to stop at Jenson; if they would not, they could go on to Huntington. These were the duties of the sheriff, which were to be strictly enforced at the town of Jenson.

The Court may marvel at the qualifications required of a sheriff under such an injunction.

The case of *Lake Shore & Mich. So. Ry. Co. vs. State of Ohio, 173, U. S., 285*, is an instructive review of the powers of a State to provide for the public convenience and the public good within the limits permitted by the power delegated to Congress of regulating the interstate commerce. This excerpt from the opinion has a direct bearing upon this case:

"The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety.

Whether legislation of either kind is inconsistent with any power granted to the general government is to be determined by the same rules."

All of the rights attempted to be enforced here rest upon an assumed police power of the State to protect the public health, the public morals or the public safety, either or all. Whether such rights are within the power of the State, or whether they trench upon the power granted to the general government by the Constitution, is to be determnined by the same rules, and necessarily, by a proper construction of the extent of the powers of the general government as granted in the Constitution, and the determination of that question, of course is a Federal one, within the meaning of the removal acts.

The last expression which we have found from this court on the attempted regulation by States of passenger traffic which has been held to be an interference with interstate commerce, is the case of *Railroad vs. State of Illinois, 177 U. S., 514*, where the Court held that a statute of Illinois requiring all regular passenger trains to stop at county seats constituted a burden upon interstate commerce in so far as it applied to through trains. The argument was made there, as it is here, that the rights sought to be enforced were only sought to be enforced within the State of Illinois, but the Court met that question by a reiteration of the doctrine of *Hall vs. De Cuir*, heretofore referred to.

## III.

### THE FOURTEENTH AMENDMENT.

"Nor shall any State deprive any person of life, liberty or property without due process of law."

This may fairly be deduced from the complaint:

That a strike existed among the miners of the defendant Coal Company and that much feeling had been engendered between the striking miners and its employes; that the Coal Company was about to import into its mines a large number of men. Considered in the light of experience in such cases, and the well-known history of strikes, this importation naturally referred to a large number of miners to take the place of the strikers.

While it is not directly alleged in the complaint, it is the fair and the necessary inference to be deduced therefrom.

It is further alleged that such importation would destroy the peace, morals and good health of the community and lead to riot, bloodshed and the dissemination of contagious and infectious diseases. It is apparent that the "dissemination of contagious and infectious diseases" was merely an attempt to incorporate a quarantine right into the complaint; the gist of it is that the importation of these men would lead to riot and bloodshed.

The well known history of strikes show such is the frequent result of the importation of men by the employer to take the place of the striking employes. Therefore, the necessary deductions to be drawn from the complaint are that this Company was about to import men to labor in its mines, and that such importation would cause striking miners, or former employes of said company, and such imported miners, to come into conflict with one another and endanger the peace of the community.

Mr. Justice Peckham delivered two opinions, construing the term "liberty" as used in the Fourteenth Amendment; one, when he spoke for the Court of Appeals of New York in the case of *People vs. Gillson, 109 New York, 389*, and the other, when he spoke for this Court in *Allgeyer vs. State of Louisiana, 165 U. S., 578.*

In the former case he said:

"The term 'liberty' as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

As defined in the latter case, it is as follows:

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Tested by these rules was the liberty of these "armed men of the low and lawless type of humanity" to work in the mines infringed? Was the liberty of the Coal Company to employ miners in other States, and bring them to their mines to earn a livelihood for themselves and a profit to the Company, impaired? Was the liberty of the Railroad Company to contract for hire to transport from other States to the town of Huntington passengers to take the place of the striking miners burdened by this injunction?

The answer to all of these questions calls for a construction of the Fourteenth Amendment of the Constitution of the United States, and brings into the case a Federal question determining its removal to the Federal Court. The affirmative answer to any of these questions calls for the dissolution of the injunction and for the sustaining of the demurrer to the complaint.

It has repeatedly been held by this Court that a corporation is a person protected by the guarantees of the Fourteenth Amendment.

*Smyth vs. Ames, 169 U. S., 466.*
*Railroad vs. Ellis, 165 U. S., 150.*
*Railroad vs. Gibbs, 142 U. S., 386.*
*Santa Clara County vs. Southern Pacific Railroad, 118 U. S., 394.*

## IV.

### THE TEST TO DETERMINE THE PRESENCE OF A FEDERAL QUESTION.

A State is not a party, within the meaning of the Judiciary Act, and a case cannot be removed on account of diversity of citizenship where the State is one of the parties to the action.

*Ames vs. Kansas, 111 U. S., 449.*
*Insurance Co. vs. Wisconsin, 119 U. S., 473.*

Although a State is one of the parties, the case can be removed to the Federal Court where a Federal question is involved, cases *supra*. The test to determine the presence of a Federal question is where the complaint shows on its face that some right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by an opposite construction.

*Ames vs. Kansas, 111 U. S., 449.*
*Starin vs. City of New York, 115 U. S., 248.*
*Insurance Co. vs. Wisconsin, 119 U. S., 473.*
*So. Pac. R. R. vs. California, 118 U. S., 109.*
*Shreveport vs. Cole, 129 U. S., 36.*

These cases all arose prior to the present Judiciary Act, but in this respect the act of 1887-88 makes no change, and this line of authorities has been expressly approved and adopted in cases arising since the passage of the present Judiciary Act.

*New Orleans vs. Benjamin, 153 U. S., 411.*

In determining this question the Court looks into the real controversy, irrespective of any suppressions or omissions, etc., in the complaint, and if it is found, by fair intendment to raise a Federal question, it is removable.

*State of South Carolina vs. Coosaw Mining Co., 45 Fed. Rep., 804.*

The opinion in this case was concurred in by Chief Justice Fuller in *47 Fed., 225*, and the removal sustained in the same case in *144 U. S., 550*.

It is apparent here that the complaint can only be sustained by holding that the rights sought to be enforced are within the police power of the State, and not contrary to any clauses of the Constitution. In other words, that this is a right left with the States and not delegated by them to the general government nor inhibited by the Constitution to be exercised by the States. It is necessary for such construction to be placed upon the Constitution before this complaint can be sustained as within the police power of a State.

## V.

### AMOUNT IN CONTROVERSY.

Issues of fact raised by the petition for removal must be tried in the Federal Court, and in the Federal Court alone.

*Railroad vs. Daughtry, 138 U. S., 298.*
*Stone vs. South Carolina, 117 U. S., 430.*

In injunction suits the value of the object to be attained, or prevented, must govern in determining the amount in controversy.

*Railroad vs. Ward, 67 U. S. (2 Black), 485.*
*Scott vs. McDonald, 165 U. S., 107.*
*Railroad vs. McConnell, 82 Fed. Rep. 65.*

The petition for removal here alleges that the matter in dispute exceeds in amount, exclusive of interest and costs, $2,000.00. That raised a question of fact which could alone could be determined in the Circuit Court of the United States, and not being controverted, must be accepted as true.

Where the complaint is silent as to the amount, the petition for removal must allege the amount to be over $2,000, and when that is done, a question of fact, determinable only in the Federal Court is raised, and such allegation is conclusive in the absence of denial.

The above statement of the rule is deduced from a recent and excellent treatise by Moon on the Removal of Causes, sections 99 and 177. The cases sustaining this proposition are collected in the notes under said sections and fully sustain the text. It would seem idle to pursue this further.

## VI.

### CAUSES REMOVABLE NOTWITHSTANDING THE COMPLAINT IS DEMURRABLE.

Counsel for appellant alleges, at page 16 of his brief, that the judgment of the Court is illogical in holding that the bill does not state a cause of action, and at the same time states a cause in which the construction of the interstate commerce clause and the Fourteenth Amendment were involved. He argues that it could not assert a right under the Constitution and laws of the United States unless it stated a cause of action. Counsel sees proper to criticize the Court for holding that the cause was removable, and still sustaining a demurrer to the complaint, because it did not state a cause of action.

This Court is open to the same criticism.

In *Railroad vs. McBride, 141 U. S., 127*, the Court said:

"Whether upon those facts the plaintiffs are entitled to recover is not a matter of jurisdiction, but one of the merits of the controversy. Suppose in a State where there is no statute providing for the surviving of such an action a suit is brought by the widow and children of a deceased person alleging that his death was caused by the wrongful act of the defendant, and the defendant having been served with process enters its appearance and denies all liability, and the trial Court improperly holds that there was a liability and renders judgment for damages, is there anything other than a matter of erroneous ruling upon the merits? Could it be held that the Court had no jurisdiction, no right to hear and determine the controversy between the parties? So, here, whether there was or was not a statute in force in the Indian Territory, providing that an action should survive in case of death, and whether upon the facts stated in the complaint the plaintiffs had a cause of action against the defendant, were questions entering into the merits of the controversy, and not matters affecting the jurisdiction of the Court. If it had jurisdiction of the parties, it had the right to inquire and determine whether upon those facts the plaintiffs were entitled to judgment."

Again this Court said in *Schunk vs. Moline & Co., 147 U. S., 500.*

"In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed when determining what is the matter in dispute."

Mr. Moon states the rule as follows:

"It is not necessary to make a proceeding in a State Court a suit that the bill, complaint or petition of the plaintiff or complaintant shall state facts sufficient to constitute a cause of action against the defendant. Where a right is asserted to invoke the jurisdiction of the State Court,—the Court having general jurisdictionof the subject matter,—it does not affect the jurisdiction that the damages sought, or other relief prayed, can not be had in that or any other form of action, upon the facts pleaded. Whether there can be a recovery upon the facts stated is a question upon the merits, and not one as to the jurisdiction. Nor does it affect the removability of a suit that there can be no recovery therein."

Moon on the *Removal of Causes, Section 44.*

## VI.

### THE REAL PARTIES TO THIS SUIT.

This suit is ostensibly the State of Arkansas on the relation of the Prosecuting Attorney of the 12th Judicial District. There is no statute of Arkansas authorizing such suit. There is no proceeding contemplated by the laws of that State for such an action. Such suit is not within the authority conferred on the Prosecuting Attorney of the 12th District.

When a public officer exceeds his authority, and the power conferred upon him by statute, his principal is not bound by his act.

*Throop on Public Officers, Section 551.*

We take it that this principle is elemental, and if we are correct in that, then this is a suit between the Prosecuting Attorney of the Twelfth Judicial Circuit, who is alleged in the petition to be a resident and a citizen of the Fort Smith Division of the Western District of Arkansas, and the defendant Corporations both created and existing under and by authority of the laws of the State of Missouri, and the case is removable on account of the diversity of citizenship.

## VII.

### GOVERNMENT BY INJUNCTION.

In speaking of the Police power, this Court, through Mr. Justice Harlan, in the case of *Mugler vs. State of Kansas, 123 U. S., 623,* said:

"Under our Constitution that power is lodged with the Legislative branch of the Government. It falls to that department to exert what are known as the Police Powers of a State, and to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health or the public safety."

In *Prentice on Police Power, p. 31*, he says:

"It falls to the Legislative branch of the Government to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health or the public safety."

We take it that it is an undisputed fact that the Judicial department of the Government can exercise no Police power; it is for that department to pass upon the validity of the Legislature's exercise of that power, and not to create the power.

*People vs. Gillson, 109 N. Y., 389.*

No statute of Arkansas has been pointed out to you, and none can be, for none exists, authorizing or attempting to authorize any such proceedings as is attempted by this complaint in equity. It is an attempted enforcement of an asserted police power of the State, without any legislative authority behind it, and dependent purely and simply upon judicial creation and judicial enforcement.

Much has been said in political and legal discussion as to "government by injunction," but we respectfully submit that this is government by injunction run mad, without the pretense of statutory authority for this action. Without the State ever attempting to enforce this police power, if it has this police power, a court assumes to act for the State of Arkansas in enforcing a right which it is claimed belongs to the police power of the State, but which has been dormant until called into being by this injunction.

Injunctions enforce equitable rights where the remedy at law is inadequate, and protect the right sought to be enforced in that method. But heretofore an injunction has not attempted to create a right and at the same time enforce that right. Injunctions have not heretofore assumed to exercise the legislative authority of a State. They have merely attempted to enforce pre-existing rights, and not to create rights, especially rights which can only be created by another department of the State government.

It is respectfully submitted that the learned District Judge who determined this case was exactly correct when he held that no amount of proof which might be offered could possibly make a cause of action under this complaint.

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